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DEC
JAMES R. BROWNING

No. 440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

J. B. BEAN and 63 OTHERS, *Petitioners,*

v.

THE UNITED STATES, *Respondent.*

On Petition For A Writ of Certiorari to the United States Court of Claims

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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If, as inferred throughout the Brief in Opposition, plaintiffs have no rights as to water other than contract rights as third party beneficiaries of a municipal contract, obviously plaintiffs have no case for compensation for taking of real property rights, as claimed in their petition, and the Court need not be concerned as to whether they might have made out a case for breach of contract.

If however, as plaintiffs assert, the plaintiffs were vested with appropriative rights to the use of water—vested rights of real property—acquired in conformity with State law—then the reclamation laws of the United States direct that such property rights be respected and followed by Federal officials,

and any contractual provision which is contrary to the reclamation laws is void. *Ickes v. Fox*, 300 U. S. 82; *Fox v. Ickes*, 137 F. 2d 30, cert. denied, 20 U. S. 792.

Although the Brief in Opposition asserts again and again that the plaintiffs' lands lie "outside the project," that fact is utterly immaterial in determining whether or not plaintiffs have satisfied the requirements of State law for prefecting appropriative water rights. The Government does not and cannot dispute that the plaintiffs made beneficial use of the water for many, many years, that their use was squarely within the terms and limitations of a valid Notice of Intent to Appropriate, that the waters in question were delivered to the plaintiffs for their beneficial use through the very irrigation works described in the Notice. This is all that State law requires. There is nothing in the laws of any state or territory which makes it material that the lands so irrigated be "within" or without a federal reclamation project. The terms of the Notice of Intent to Appropriate here in question in no wise limit the location of the lands to be irrigated through the described irrigation works or prescribe that they must be "within the project."[1]

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[1] That plaintiffs lands be "outside the project" means, as a practical matter, that the plaintiffs and their neighbors must pay their own way and may not enjoy the benefit of an interest-free subsidy substantially identical to that described in *Ivanhoe Irr. District v. McCracken*, 357 U. S. 275. The Hudspeth District has not only financed all its own irrigation works by an interest bearing, general-obligation bond issue, but in addition has contributed substantially toward bearing the cost of the project irrigation works.

The entire Brief in Opposition is predicated on the assumption that State water laws and the Federal Reclamation laws have no application and grant no rights to citizens who use water carried under a Warren Act contract. But this is the very question which we urge the Court to review. The predicate of the Brief in Opposition—that State appropriation laws are completely displaced by Warren Act contracts—is strangely incongruous when matched against the express provisions of the Reclamation Act and the Warren Act:

a. That in acquiring water rights under the Reclamation Act the Secretary should proceed in conformity with State and territorial appropriation laws;

b. That rights to the use of water acquired under the Reclamation Act should be appurtenant to the land irrigated and appropriative in character;

c. That water delivered under Warren Act contracts should not be used otherwise than as prescribed by law as to project lands; and

d. That nothing in the Warren Act should be construed as enlarging the right of the United States to control the waters of any stream in any State.

To justify the decision below, we must conclude that the Warren Act creates a second-class, perpetually inferior species of water user in the Western States—that the rights to use water on the "Warren Act lands" must be forever inferior to rights to use water on "project lands," regardless of relative priority in time. To justify the decision below we must conclude, as the Brief in Opposition chooses to as-

sumes that the "preserving-a-first-right" phrase of the Warren Act refers to rights to the use of water appropriated under State law, as opposed to rights to the service of storage and carriage through federally-owned irrigation works. If the Brief in Opposition is wrong upon this crucial point, then it necessarily follows, not only that plaintiffs are vested with appropriative water rights, but that the Government's interference with those water rights is a taking of the same, regardless of any purported limitation in any municipal contract.

For the reasons outlined in the petition for certiorari we submit that the "preserving-a-first-right" language of the Warren Act refers only to the service of storage and carriage through Federal irrigation works and has no effect upon rights to the use of water. Rights to the use of water depends upon State appropriation laws, reinforced by the Federal Reclamation Act. Notably, the Brief in Opposition cites no authority to the contrary, other than the opinion of the Court below and a short excerpt from the Congressional Record which is lifted out of a context so as squarely to reverse the substance of what was said.[2]

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[2] What Congressman Mondell actually said, contrary to the implications of Br. in Opp. n 6, was that State appropriation laws protect the priorities of all project lands within the appropriation as against any subsequent appropriation for Warren Act lands. He did not even suggest, however, that the Warren Act serves to subordinate a prior appropriation for Warren Act lands to be a subsequent appropriation for project lands. Nor did he suggest that when project lands and Warran Act lands are irrigated under the same appropriation, as here, the Warren Act lands are inferior, regardless of priority in time. Indeed, Mr. Mondell was emphatic that Congress "could not" alter rights under the State appropriation laws.

WHEREFORE, a writ of certiorari should issue.

Respectfully submitted,

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